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7 UNITED STATES BANKRUPTCY COURT
8 NORTHERN DISTRICT OF CALIFORNIA

9 In re

10 ARTE WHYTE and GINNY WYATT-WHYTE, No. 04-11751
11 Debtor(s).
12 _____/

13 Memorandum on Motion to Assume Lease
14 _____

15 Within 60 days of the commencement of this Chapter 13 case, but after confirmation of a plan
16 which does not provide for assumption or rejection, the debtors moved for assumption of a lease of non-
17 residential real property at 228 S. Cloverdale Blvd., Cloverdale, California. The debtors operate a
18 retail store at that location. The lessor, Valencia Family Trust,¹ objects on three grounds: that the
19 debtors failed to assume the lease on time, that assumption is barred by plan confirmation, and that the
20 lease is unfavorable to it. The court finds no merit to these arguments.

21 “[M]ost courts have required that the trustee or debtor in possession act [to assume a lease]
22 before the expiration of the 60-day period [of § 365(d)(4) of the Bankruptcy Code], but have held that
23 court approval of a trustee or debtor in possession’s motion to assume may be granted after the
24 expiration of the period.” 3 **Collier on Bankruptcy** (15th Ed. Rev.), ¶ 365.04[3][e], p. 365-34, citing,
25 *inter alia*, In re American Healthcare Mgmt., Inc., 900 F.2d 827 (5th Cir. 1990). That is the rule in this

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¹And others, collectively referred to as the Trust.

1 circuit. In re Victoria Station Inc., 840 F.2d 682, 684 (9th Cir., 1988). The case relied upon by the
2 Trust, In re Southwest Aircraft Services, Inc., 831 F.2d 848 (9th Cir. 1987), involved a motion for
3 extension, not a motion to assume; in that case, a draconian ruling in favor of a lessor was reversed. It is
4 in no way inconsistent with Victoria Station.

5 While the lease should have been assumed as part of the plan, failure to do so is not fatal. The
6 lease continues in existence, and the plan can be amended. 3 **Collier on Bankruptcy** (15th Ed. Rev.), ¶
7 365.04[3][d], p. 365-31.²

8 Standing applicable authorities on their heads, the Trust appears to argue that the debtors should
9 be barred from assuming the lease because its terms are too favorable. There is simply no basis for this
10 argument; a trustee or debtor in possession would be breaching a fundamental duty to the estate by *not*
11 seeking assumption of such a lease.

12 The court recognizes the argument of the Trust that the lease is too favorable because the person
13 who negotiated it lacked capacity. The court sees no reason to engage in this litigation in the context of a
14 Chapter 13, which can be dismissed at any time, and will therefore abstain from adjudicating the validity
15 of the lease. The debtors accordingly will be authorized to assume the lease subject to all claims and
16 defenses relating to the validity of the lease available to the Trust under state law.

17 Counsel for the debtors shall submit an appropriate form of order granting their motion to assume
18 the lease which counsel for the Trust has approved as to form. The order shall recite that the lease is
19 assumed subject to all claims and defenses relating to the validity of the lease available to the Trust
20 under state law and that this court abstains from adjudicating those issues.

21 Dated: November 12, 2004

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23 
24 Alan Jaroslovsky
25 U.S. Bankruptcy Judge

26 ²In Chapter 11 cases, plans may not be modified after substantial consummation. There is no
similar restriction in Chapter 13 cases.